IN THE UNITED STATES DISTRICT COURT
FOR DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Franklin E. Robson, d/b/a Robson Law Firm, P.A. and JNR, Inc.,	)	C.A. No. 2:93-2614-22
Plaintiffs,	)	
vs.	)	ORDER
Resolution Trust Corporation,	)	
Defendant.	)	

This action is brought by a now suspended, federally incarcerated attorney seeking to recover attorney fees from the Receiver for the Citadel Federal Savings Bank. The Complaint asserts causes of action for breach of contract and declaratory relief. Jurisdiction is based on 12 U.S.C. § 1441(a)(1)(1). The matter is before the court on the following motions: (1) Resolution Trust Corporation's (hereinafter "RTC") Motion to Dismiss; (2) Plaintiffs' Motion to Dismiss or for a Continuance; (3) Plaintiffs' Motion to Compel; and (4) Plaintiffs' Motion for Appointment of a Guardian Ad Litem and other Relief.

The court heard oral argument on the above motions on July 11, 1994. Plaintiff Robson appeared pro se. The court granted the parties leave to file additional memoranda and evidence subsequent to the July 11, 1994, hearing. The court has reviewed the entire record in this matter, including the pleadings, briefs, depositions, affidavits and all other materials, and studied the applicable law. For the reasons given below, the court grants RTC's Motion to Dismiss.[1] All

[1] RTC's Motion to Dismiss is based on alleged lack of subject matter jurisdiction, pursuant to Rule 12(b)(1), Fed. R. Civ. P., and alleged failure to state a claim, pursuant to Rule 12(b)(6), Fed. R. Civ. P. In RTC's brief and at oral argument, counsel for RTC invited this court to convert the motion to dismiss to one for summary judgment, pursuant to Rule 56, Fed. R. Civ. P., because of the inclusion of materials beyond the pleadings.

other pending motions are mooted by the court's grant of RTC's Motion to Dismiss, which is converted to one for summary judgment.

I. BACKGROUND

On August 6, 1992, the Office of Thrift Supervision appointed RTC Receiver for Citadel Federal Savings Bank. On September 14, 1992, the Supreme Court of South Carolina suspended Plaintiff Robson from the practice of law until further order.

On November 17, 1992, Robson filed a Proof of Claim with RTC claiming $250,000 in attorney fees owed to the Robson Law Firm, P.A. for legal services rendered to Citadel Federal Savings Bank. On December 8, 1992, Robson was indicted for one count of bank fraud, pursuant to 18 U.S.C. § 1344, for alleged check kiting. Also on that day Robson was interviewed by Carol J. Brown, Investigator/Criminal Coordinator for RTC, with regard to matters under investigation by federal authorities involving Citadel Federal Savings Bank, a bank for which Robson was formerly a director. Brown, a RTC employee, coordinates with criminal investigations conducted by the FBI.

On January 15, 1993, Robson pled guilty to one count of bank fraud before The Honorable Sol Blatt, Jr.

Pursuant to a Notice of Disallowance dated July 30, 1993, the RTC informed Robson it was rejecting his claim for $250,000 in attorney fees. The notice stated, in part, that if he wished to contest the disallowance of the claim he had to file suit within sixty days of the date of the Notice. Sixty-two days after the date of the Notice, on September 30, 1993, Robson and JNR, Inc., filed the Complaint in this case.

Both parties consented to this treatment. Accordingly, this court will treat the motion as a Motion for Summary Judgment.

The Complaint asserts that Robson, and JNR, Inc., "a contingent Assignee, affected with an interest" (Complaint, Para. 4)[2], entered into a contract for legal services, which was breached by Defendant. Plaintiff seeks declaratory relief and monetary damages based on breach of contract and conversion. Defendant has not answered, but filed the present Motion to Dismiss.

On April 18, 1994, Robson was sentenced by Judge Blatt to imprisonment of one year. On May 5, 1994, Robson voluntarily surrendered to F.P.C. Estill.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). It is well established that summary judgment should be granted only "when it is clear that there is no dispute concerning either the facts of the controversy or the inferences to be drawn from those facts." Pulliam Inv. Co. v. Cameo Properties, 810 F.2d 1282, 1986 (4th Cir. 1987).

The party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact, and the court must view the evidence before it and the inferences to be drawn therefrom in the light most favorable to the nonmoving party. United States v. Diebold, Inc., 369 U.S. 654 (1962). When a summary judgment motion is properly supported, the party opposing it must go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

III. ANALYSIS

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[2] At oral argument Robson explained that JNR, Inc. is a corporation in dissolution and he is its Chairman.

Defendant argues that this court lacks subject matter jurisdiction, pursuant to Rule 12(b)(1), Fed. R. Civ. P., because Plaintiff's action was not filed within the sixty day statute of limitations period imposed by 12 U.S.C. § 1821(d)(6)(A). Pertinent provisions of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) provide, in part, that:

> Before the end of the 60-day period beginning on the earlier of--
>
> (ii) the date of any notice of disallowance of such claim pursuant to paragraph (5)(A)(i),
>
> the claimant may . . . file suit on such claim . . . in the district court or territorial court of the United States for the district within which the depository institution's principal place of business is located . . . (and such court shall have jurisdiction to hear such claim).

12 U.S.C. § 1821(d)(6)(A). Another provision states:

> If any claimant fails to--
>
> (ii) file suit on such claim . . .
>
> before the end of the 60-day period described in subparagraph (A), the claim shall be deemed to be disallowed . . . as of the end of such period, such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.

12 U.S.C. § 1821(d)(6)(B). With regard to judicial review, another section provides:

> Except as otherwise provided in this subsection, no court shall have jurisdiction over--
>
> (ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

12 U.S.C. § 1821 (d)(13)(D). In another case addressing FIRREA filing deadlines, Capitol Leasing Co. v. F.D.I.C., 999 F.2d 188 (7th Cir. 1993), the court found a computer lessor's breach of contract claim against the FDIC time barred because the lessor had failed to file within the sixty day period specified by 12 U.S.C. § 1821 (d)(6)(A), or the 180-day period outer limit for the receiver's determination on a claim. The lessor filed suit 86 days after the date of the Notice of Disallowance, which the lessor alleged it had not received. In rejecting the lessor's contention it should have been afforded an evidentiary hearing to prove its nonreceipt of the Notice of

Disallowance, the Seventh Circuit emphasized that the strong wording of FIRREA controls. "Neither the receiver's failure to mail notice of its claim determination nor the claimant's failure to receive notification toll the statute of limitations." Id. at 193.

Capitol Leasing is not controlling here because Plaintiffs admit receiving the Notice, but assert that the RTC waived its right to enforce the sixty day deadline. It is, however, persuasive authority for this court's conclusion that FIRREA time constraints are enforced by the courts, in the absence of strong evidence to disregard them. Nevertheless, because at least one court has found the time limits for challenging denial of a claim filed with the FDIC capable of extension by agreement between the parties, Mansolillo v. F.D.I.C., 804 F. Supp. 426 (D.R.I. 1992), the court has carefully examined the entire record for evidence of such purported agreement. The court finds, however, that Plaintiffs' claim that the RTC waived the statute of limitations is totally unsupported by evidence of any witness other than Plaintiffs.

Plaintiffs' Supplemental Memorandum argues that the court should apply the 60 day period from the time of his receipt of the Notice of Disallowance. Such construction, however, contradicts the plain language of the statutory provision and the July 30, 1993, letter accompanying the Notice of Disallowance, which was sent certified mail. The letter states, "Pursuant to 12 U.S.C. Section 1821(d)(6), if you wish to contest this disallowance, then, within sixty (60) days from the date of this letter you must file suit on your claim against the Resolution Trust Corporation . . ."(emphasis added). Attachment to RTC's Memo In Support of Motion to Dismiss. Further, subsection (d)(6)(A) is phrased in terms of from "the date of any notice of disallowance," not from the date of receipt of the notice. Therefore, Plaintiffs' contention has no merit.

Nevertheless, Plaintiffs also allege Carol J. Brown granted an extension of time to file the

suit. However, her affidavit states she did not grant an extension of time to file a claim and that she had no authority to do so. (Aff. Brown, Para. 3). Ms. Brown first met with Robson on November 19, 1992, which was two days after Robson had filed his Proof of Claim with the RTC.[3] However, the Notice of Disallowance, to which the sixty-day time period applied, was not issued until July 1993. It strains credulity to suggest that Ms. Brown would have granted Plaintiffs an extension of time to file suit when she could not even have known in November 1992 when the Notice of Disallowance would be issued. Moreover, Robson admitted at oral argument that the extension purportedly granted by Brown was never subsequently renewed or confirmed after his receipt of the Notice of Disallowance dated July 30, 1993.

In addition, neither the testimony of FBI agent Rosenlieb nor Fred Stiles, IRS investigator, support Plaintiffs' version of events. Although Plaintiffs' Return to Motion to Dismiss argues that Mr. Stiles "remembers said extension of time being discussed by Carol Brown, Esq. and the undersigned" it does not support Plaintiffs' argument that any extension was conferred. Stiles' testimony states:

> I'll tell you what I remember about that situation. . . I can remember you [Robson] making a statement to the effect --and I don't know the exact words. Something to the effect that if the government was going to take all your records, then you might need an extension. . . Basically, that's about all I can remember about that situation. I don't remember what Carol's response, if any, was or what Mr. Rosenlieb's response, if any, was.

Stiles Depo. at 8-9. Thus, although Stiles' recollection is that Robson mentioned something about needing more time, he had no recollection of any response by the government agents. Moreover, any extension Robson would have needed at that time was for the filing deadline for

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[3] The record reflects that Plaintiffs were late in submitting the Proof of Claim to the RTC. The form Proof of Claim directed to Plaintiffs, attached to the RTC's Motion to Dismiss, states that "Your claim must be filed with us no later than November 13, 1992." However, Plaintiffs did not file until November 17, 1992.

the Proof of Claim, which Plaintiffs had failed to submit by the November 13, 1992, deadline, and not the deadline for filing suit following issuance of any Notice of Disallowance.

Agent Rosenlieb's affidavit does not support Plaintiffs' arguments. He met with Robson at the same November 19, 1992, meeting attended by Carol Brown. His testimony is: "I can not recall Brown granting any extension to Robson during these joint interviews. I would probably have recalled her granting an extension if she had in fact granted same." 4/26/94 Aff. of Rosenlieb, at 1.

Viewing the evidence in the light most favorable to Plaintiffs, the record, at best, shows that Robson may have casually mentioned to Brown that he needed some type of extension, to what is unclear, but that no promise or commitment was made by Carol Brown. Unsupported speculation is insufficient to defeat a summary judgment motion. Felty v. Graves-Humphreys Co., 818 F.2d 1126 (4th Cir. 1987). If the evidence favoring the nonmoving party is merely colorable or not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. at 249-50. The United States Supreme Court has recognized:

> The mere existence of a scintilla of evidence will be insufficient; there must be evidence on which the jury could reasonably find for the nonmoving party. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the nonmoving party is entitled to a verdict.

Id. at 252. The Fourth Circuit has emphasized that where no genuine issue of material fact exists, the district judge has a strong affirmative obligation to prevent factually unsupported claims and defenses from proceeding to trial and occupying the time of jurors. See Felty, 818 F.2d at 1128.

At most, Plaintiff Robson's allegation of an extension, which is unsupported by the testimony of two other witnesses present at the meetings, presents a scintilla of evidence.

However, because the court is convinced that reasonable jurors could not find by a preponderance of the evidence that Plaintiffs were entitled to a verdict on such evidence, that evidence does not create a genuine issue of material fact. Accordingly, the court grants RTC's Motion for Summary Judgment.

IV. CONCLUSION

IT IS THEREFORE ORDERED that the RTC's Motion to Dismiss, converted to a Motion for Summary Judgment, is granted; all other pending motions are mooted.

IT IS SO ORDERED.

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CAMERON MCGOWAN CURRIE
UNITED STATES DISTRICT JUDGE

November __, 1994
Florence, South Carolina